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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 350

LOCAL UNION NO. 742, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BERNARD M. MAMET,
Suite 1326
327 South La Salle Street,
Chicago, Illinois 60604
HArrison 7-7630

Attorney for Petitioner

KEENAN PRINTING COMPANY 365

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NO.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on March 16, 1967.

CITATIONS TO OPINION BELOW

The decision of the National Labor Relations Board is reported at 157 NLRB No. 35 (J.A. 91).[1] The opinion

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1. A Joint Appendix was filed by the parties in the Court of Appeals which is part of the certified record filed herein. Reference to the said Joint Appendix and the Appendices (attached hereto), respectively, will be indicated by the letters "J.A." or "App.", followed by the page citation to the pertinent matter.

of the Court of Appeals for the District of Columbia Circuit, printed in Appendix A hereof, page A 1, is reported at —— F. 2d ——.

JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1967. This Court on May 29, 1967, granted an extension to file a petition for certiorari until July 14, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Does the Administrative Procedure Act as intertwined with the Fifth Amendment require the National Labor Relations Board to effectively apprise a respondent of its right to counsel in an adjudicative hearing?

2. May the National Labor Relations Board revert to a *per se* approach in finding a union-employer agreement illegal, by relying exclusively upon the existence of such agreement conditioning employment generally on the acquisition of a work permit and without finding discrimination which encouraged union membership?

STATUTES INVOLVED

The statutes, rules and constitutional provisions involved herein are listed below and appear in Appendix "B" of this Petition:

Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. § 141 *et seq.*, as amended by 73 Stat. 525, 542, 545 (Section 8 (a)(3), 8 (b)(1)(A), 8. (b)(2) and 8 (f)); App. 4.

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. § 1001 *et seq.* (Section 5 (a)); App. 6.

Constitution of the United States, Amendment V; App. 6.

Constitution of the United States, Amendment VI; App. 7.

Federal Rules of Criminal Procedure, Rule 44; App. 7.

STATEMENT

This litigation involves an unfair labor practice complaint filed by the National Labor Relations Board ("Board") alleging that Local 742 ("Petitioner" or "Local") affiliated with the United Brotherhood of Carpenters and Joiners of America ("International Union"), discriminated against Robert L. Reinero ("Reinero") an employee of J. L. Simmons Company, Inc. ("Employer"), in order to encourage membership in the Local.

The Hearing

At the hearing of this matter, the Business Agent of the Local appeared alone. At no point in the proceeding was he advised that the Administrative Procedure Act accorded the Local the right to be represented by counsel. The Trial Examiner asked at the outset that counsel for the parties state their names. The Business Agent said that he did not have counsel. The Trial Examiner then asked if the Business Agent was the Local's representative, and the Business Agent said he was (J.A. 4).

Not only was there this initial failure to apprise the Local of its rights, but even when it became clear that no real record upon which to base guilt or innocence could,

be made without the Local first being represented by counsel, the Trial Examiner did nothing.

The Business Agent's lack of knowledge relative to the complaint against him was glaring and readily discernible to anyone, let alone a knowledgeable Trial Examiner. When the Business Agent, confused even about his need to remain at the hearing, asked if he could be excused, the Trial Examiner suggested he stay "since you are the Respondent and principal witness" (J.A. 42). The Trial Examiner apparently had many suggestions during the course of the hearing, but none, however, that would have protected the rights of Petitioner. The Business Agent was confused about what would appear in the transcript (J.A. 8 and 9), and preoccupied with the number of copies of an exhibit he might be required to produce even though the exhibit was the Government's (J.A. 6). He was not aware of his right to cross examine the Government's witnesses and even asked permission of the Trial Examiner to "ask a question" (J.A. 16).

How the Business Agent became what the Trial Examiner characterized as the "principal witness" is an interesting story. When the Government rested its case the Trial Examiner asked the Business Agent if he had any witnesses. The answer was no. The Trial Examiner then asked if he himself wanted to take the stand. The Business Agent said yes (J.A. 29). He started to tell about Reinero being a "renegade" but the Government lawyer objected and the Trial Examiner said "at this point you are to tell the story of this situation as you recall it" (J. A. 30). The Business Agent, then obediently started to tell about Reinero's strict violation of "the workings of our Brotherhood", but the Government lawyer objected again and the Trial Examiner said "Just go on with your state-

ment as to what you recall about it now." (J.A. 31). When the Business Agent was through the Government lawyer cross-examined him, and, of course, without objection—there being no one there to object, let alone to ask questions on redirect. It is interesting to note that there are approximately 100 pages of testimony in the entire transcript of which thirty percent consists of the cross examination of the Business Agent by the Government lawyer. After completion of the cross examination, the "principal witness" put on his hat and coat and began to leave. The Trial Examiner, however, told him to stay, stating that the hearing was not over yet (J.A. 47).[2]

The Trial Examiner found that the Local had discriminated against Reinero in order to encourage membership in the Local. After that decision the Business Agent retained counsel. Exceptions to the Trial Examiner's Decision were filed with the Board on behalf of the Local asking that the matter be remanded to the Region "for the purpose of taking additional testimony, for the purpose of examination and cross examination and to permit the introduction of documentary evidence *so that a full*

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2. When the Business Agent was excused as a witness the following dialogue took place:

> "The Witness (Foreman): Can I be excused completely?
> * * *
>
> "Mr. Foreman: Do I have to stay for this?
>
> "Trial Examiner: Well, I suggest you stay for this since you are the Respondent and principal witness." (J.A. 42)

And later, after Reinero was excused as a witness:

> "Trial Examiner: Mr. Foreman, you are putting on your hat and coat. I am about ready to close this hearing. There is a short closing statement here.
>
> "Mr. Foreman: Excuse me, I am sorry". (J.A. 47)

hearing may be had."[3] The Board held that the Local had "elected" to appear without the aid of counsel (J.A. 91). The Court of Appeals agreed (App. 1, 3).

The Claim of Discrimination

Reinero was a member of the International Union (J.A. 19). He belonged to a sister local of the Petitioner. When he came to Decatur, Illinois, he went to the Business Agent of the Local Union who issued him a work permit and found a job for him (J.A. 19). He was an apprentice. Dif-

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3. Exception No. 13 to the Trial Examiner's Decision reads in full, as follows:

> "Under the circumstances of this case, by depriving Respondent Union of a full and fair hearing and of due process in violation of the Fifth Amendment to the United States Constitution, the Administrative Procedure Act, the Act involved herein and the Board's Rules and Regulations and its Statements of Procedure in that Respondent Union did not have counsel at any stage of the proceedings (prior hereto) and at a minimum should have been apprised of its right to have counsel and the fact that counsel might be desirable to properly protect its interest, particularly when the Trial Examiner noted (or should have noted) Respondent Union's absence of any knowledge of the procedure followed, of what the term "evidence" meant and of substantive law regarding cases of this type. The undersigned, having practiced before this agency for many years, certifies to the Board that, in his opinion, had the Union had counsel, no violation would have been found by the Trial Examiner. Relying upon the Record in its present state, it is the opinion of the undersigned that the Trial Examiner's recommendations should not be accepted and that the matter should be dismissed for reasons which will become more apparent to the Board after a brief has been submitted. In the alternative, if the Board disagrees with such position, request is made that the matter be remanded to the Region for the purpose of taking additional testimony, for the purpose of examination and cross examination and to permit the introduction of documentary evidence so that a full hearing may be had."

ficulties subsequently arose between Reinero and the Business Agent as regards the fulfillment of his apprenticeship duties.[4] The Business Agent refused to issue him a further work permit because of his failure to perform his duties as an apprentice. That is the full extent of the Local Union action. The Employer discharged Reinero and the Board found that the Local had violated the law because there was an "understanding" between the Employer and the Local requiring a work permit as a condition of employment. The Court of Appeals simply agreed.

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4. Reinero, himself, wrote to the Apprenticeship Board at Modesto Junior College, California, (where his home local is located) asking to be released from his Indenture there "so that I may continue to work, as the Local 742 cannot accept me while your Indenture is still binding upon me." (J.A. 72).

REASONS FOR GRANTING OF WRIT

1. Right to be Effectively Apprised of Right to Counsel

There are 74,004 local unions in the country,[5] and of this amount, seventy percent have fewer than 200 members and gross receipts of less than $20,000.00 a year.[6] There are at least 140,000 collective bargaining relationships between unions and employers in the country.[7]

This case concerns itself with the due process protections afforded the smaller local unions in the country as regards prosecution by a governmental agency. Here, Petitioner, a smaller local union, had a money judgment entered against it because the National Labor Relations Board deprived it of a full and fair trial by the Board's refusal to order a new hearing, even though it was clear that Petitioner was effectively denied the right of counsel. The narrow question presented is whether Petitioner was denied a fair hearing when it appeared at an unfair labor practice proceeding without the aid of counsel, and where

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5. Directory of National and International Labor Unions in the United States, 1965 (latest available), United States Department of Labor, Bulletin No. 1493, April, 1966, page 60.

6. Report of Senator Goldwater on deficiencies in House version of Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401 *et seq.*, Congressional Record, July 27, 1959, page 13016. Note the comments of Representative Thompson and the arguments in the House relating to exemptions under the said statute for smaller labor organizations: ". . . locals are extremely small. The officers are unpaid. They do the work on union affairs and union books at the kitchen table with the help of their wives or whoever they can get." Congressional Record, August 5, 1959, page 13878.

7. Directory of National and International Labor Unions in the United States, 1965, United States Department of Labor, Bulletin No. 1493, April, 1966, page 61.

its representative (business agent) demonstrated a complete lack of understanding relative to the procedures and substance involved, the complexity of the issues both legal and factual, and the possible scope of an adverse decision, and where the Trial Examiner at no time informed the Union of its right to be represented by counsel or suggested that it might be prudent under the circumstances if the Union obtained counsel.

The Administrative Procedure Act[8] requires that a party be "accorded the right" to be represented by counsel. Here, the National Labor Relations Board knowingly effectively deprived Petitioner of that right. The specific factual context is simple enough. The government initiated action against Local Union 742 of Decatur, Illinois, by sending a formal complaint containing a notice of the trial date to the Local Union's Business Agent. The government was represented by an attorney from the office of the General Counsel of the Board. The Trial Examiner, another attorney, was dispatched by the General Counsel's office from Washington. The Business Agent, a member of the Local Union and a carpenter by occupation, elected from the rank and file, appeared alone.

We will not burden the Court with a re-examination of the conduct of the hearing in relationship to the Trial Examiner's and General Counsel's approach on the one hand and the Business Agent's on the other. One merely need read the excerpts of testimony to see that the General Counsel was apparently out to win a case at all costs. The Business Agent was more than an easy mark. Completely confused procedurally—more concerned about how the failure to have exhibits in

8. 60 Stat. 240, 5 U.S.C. § 1005 (a).

duplicate would bear upon his attempt to "clear myself", than the substance involved in the allegations, Foreman (the Business Agent) vegetated throughout the hearing; apologizing at one time, leaving early at another and responding in a meek puppet-like fashion to the attacks of the General Counsel and the directions of the Trial Examiner: Take the stand now, Mr. Foreman. Now, tell us what you know—but don't tell us that because we are not talking about that now—and maybe not even later, either.[9] And this the Board calls due process. At no time was an objection made by the General Counsel overruled or was there even any discussion concerning the nature of the evidence or its admissibility. The General Counsel identified, for purposes of identification, an exhibit but never introduced same. These were the Apprenticeship Rules and Standards which would prove very beneficial to Petitioner's case were they in the Record. Was Foreman required to know the difference between the identification and the introduction of an exhibit? The General Counsel knew this. The Trial Examiner knew this, as he knew, and stated, that Foreman had better stay for the hearing since he was "the Respondent and principal witness" (J.A. 42). Foreman was all these things to all these people and despite the complete direction of the

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9. Perhaps this is an example of the "characteristic unfairness" Dean Roscoe Pound was talking about when he questioned the excessive zeal of administrative agencies such as the N.L.R.B. Dean Pound stated:

> "Zeal for carrying out the special function assigned to them leads them to look at their special task out of proportion and to consider individual rights, constitutional guarantees, and the law of the land as negligible . . . It was marked in the administration of the National Prohibition Act and has been specially marked in recent administrative proceedings."

He cited four cases, all of them, interestingly enough, dealing with the N.L.R.B. Pound, "Jurisprudence" Vol. II, p. 439 (1959).

hearing by the General Counsel and Trial Examiner, neither took the very little time required to advise Foreman that he had the right to counsel and perhaps should acquire one. And the actions in this case, the Board says, satisfy its due process obligation.

What does due process require? Obviously, hearings before the National Labor Relations Board involve not only the taking but the presenting of evidence, as well. In the main, it is only that which has been presented which is taken, and this all ends up in findings which can vindicate or convict.[10]

Petitioner is one of 2,800 local unions across the country affiliated with the United Brotherhood of Carpenters and Joiners of America. The constitution of the United Brotherhood establishes these locals as autonomous bodies, and they are so treated.[11] Local 742 is located in Decatur, Illinois, a small town northeast of Springfield on the Sangamon River. The town processes corn and soybeans and is the distributing point for a farm and livestock area.[12] That is where the Business Agent comes from. The average educational level of the work force in the United States is 12.2 years, or just over four years of high

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10. See, *National Labor Relations Board* v. *Prettyman*, 117 F. 2d 786, 790 (CA 6, 1941). *United States ex rel. Castro-Louzan* v. *Zimmerman*, 95 F. Supp. 22, 25 (1950). It is interesting to note that in the latter case the court while finding a denial of due process stated that the proceedings "indicate on the surface that the formalities of a fair hearing were observed in that Realtor was advised that he had a right to counsel."

11. *Keenan* v. *Metropolitan District Council of Philadelphia, etc.*, (D.C. E. Penn, 1966), 63 LRRM 2566.

12. Columbia Encyclopedia, Third Edition (1963), p. 549.

school.[13] The average educational level of a carpenter is two years below that.[14] The following chart indicates the percentage of each of the various age groups of carpenters which finish high school.[15]

AGE GROUP	PERCENTAGE COMPLETING HIGH SCHOOL
25 - 34	40%
35 - 44	32%
45 - 54	18%
55 - 64	11%
Total	26%

And so, we are confronted here with a small union from a small town prosecuted by a legally talented governmental agency and defended by a carpenter member whose formal educational level is far below that of his adversaries, and which resulted in a money judgment being entered against this union because no fair record could be developed. True, there are giants in the labor movement with full time counsel and with readily available professional talent. But, Petitioner takes its place, however, not with the giants but with a majority of 74,000 plus local unions in the country running their own affairs and selecting their leadership from their own ranks. At a minimum, does not due process require effective apprisal of the right to counsel. And, the issue we submit is directed

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13. Special Labor Force Report No. 65, United States Department of Labor, Bureau of Labor Statistics (March, 1965) p. A-13.

14. *Ibid.*

15. United States Census of Population 1960, Occupation by Earnings and Education, United States Department of Commerce, Bureau of the Census.

to the apprisal of the right to counsel, not necessarily at the investigatory stage of the matter, but at the trial.

What does due process require here? Speaking of the Sixth Amendment, this Court has said: "It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel."[16] Can anything less be said of the average carpenter brought before a tribunal with power to take his property wherein the prosecution is presented by experienced and learned counsel?

We are not asking this Court to consider a principle in a vacuum unrelated to the facts in the instant case, nor are we seeking an all encompassing doctrine beyond that necessary for the protection of due process. We do, on the other hand, ask this Court to settle whether or not being "accorded" the right to counsel in an adjudicative proceeding includes being warned of such right. The Business Agent was asked if he had counsel. He replied no. The trial began and the Business Agent, answering "no" to an innocuous question of whether or not he had counsel now became not only the sole defender, but the "principal witness", as well.

How different is this from this Court's pronouncements in criminal cases.[17] The Sixth Amendment merely states that an accused shall have the right to have the assistance

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16. *Johnson* v. *Zerbst*, 304 U.S. 458, 462-63 (1938).

17. *Miranda* v. *State of Arizona*, 384 U.S. 436 (1966); *Escobedo* v. *State of Illinois*, 378 U.S. 478 (1964); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

of counsel and this Court has stated that this includes the right to be apprised of such right (without going into the other rights generated by the recent cases). The Administrative Procedure Act (the protection of which is obviously included within the purview of the due process clause of the Fifth Amendment) requires that every party shall be accorded the right to counsel. Wherein do the rights differ in a proceeding brought by the government, whether the proceedings be criminal or adjudicative.[18] Neither the Sixth Amendment nor the Fifth Amendment (adopting the Administrative Procedure Act) specifically talk in terms of the right of apprisal and no distinction is made in the Fifth Amendment between "life, liberty or property", insofar as requiring due process of law.[19] And,

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18. In *Hannah* v. *Larche*, 363 U.S. 420, 422 (1960), this Court held that the Administrative Procedure Act assures due process under the Fifth Amendment, at least, where there is a trial type, adjudicative proceedings. Note the concurring opinion of Justice Frankfurter wherein he stated that: "Were the Commission exercising an accusatory function . . . the rigorous protection relevant to criminal prosecutions might well be the controlling starting point for assessing the protection which the Commission's procedure provides." (page 488.) *See also* the Ninth Circuit's interpretation in *Federal Communications Commission* v. *Schreiber*, 329 F. 2d 517, 525 (C.A. 9, 1964).

19. See *ExParte Plastino*, 236 Fed. 295 (1916); *Harp* v. *Zahariades*, 90 F. 2d 3, 5 (C.A. 8, 1937); *Kielema* v. *Crossman*, 103 F. 2d 292 (C.A. 5, 1939); and *United States ex rel. Wlodinger* v. *Reimer*, 103 F. 2d 435 (C.A. 2, 1939). In the analogous field of Criminal Law the counterpart to Section 5(a) of the Administrative Procedure Act is Rule 44 of the Federal Rules of Criminal Procedures (adopted the same year as the passage of the Administrative Procedure Act), which reads in part, as follows: "If the defendant appears in court without counsel, the court shall advise him of his right to counsel . . ." In *Spevak* v. *United States*, 158 F. 2d 594, (C.A. 4, 1946), cert. denied 330 U.S. 821, the Court stated that Rule 44 was merely a codification of what had previously been established by Federal decisions. Moreover, obviously, this Court did not limit the right to be advised of the right to counsel in criminal cases at the court stage only.

"the Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." (Emphasis supplied)[20]

The Board's concept of the respondent before it having "elected" while unexplained is not inexplicable. It is indeed revealing, for obviously it itself felt that due process required its agents to apprise a respondent of the right to counsel. Hence, the Board's adoption of its "election" theory. And, the Court of Appeals' rationale is similarly interesting, for it apparently believes a dichotomy exists between criminal and administrative adjudicatory proceedings under the Fifth Amendment, witness its recitation that "Counsel for the Local cites us no civil or administrative case in support of his contention." (App. 3).

We submit that the rationalization of the Board and the Court of Appeals is incompatible with the due process requirements of a full and fair hearing. When one weighs the simplicity of requiring a warning of the right to have counsel as against the inequitous results flowing from its failure, the position of the Board—where prosecution and decision making, though theoretically separate, reside in the same agency—becomes even more bewildering.

2. The Board's Reversion to its Per Se Approach

The decision of the Court of Appeals in the instant matter is in direct conflict with this Court's decision in *Local 357, International Brotherhood of Teamsters* v. *National Labor Relations Board*, 365 U.S. 667 (1961). In the in-

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20. *Miranda* v. *State of Arizona*, 384 U.S. 436, 468-469 (1966).

stant case, the District of Columbia Circuit held that because Reinero was discharged by the Employer pursuant to an "understanding" between the Union and the Employer, the Act was violated. This is a complete return to the *per se* approach first initiated by the National Labor Relations Board in *Mountain Pacific Chapter, etc.*, 119 NLRB 883 (1958), and eventually struck down by this Court in the *Local 357, I.B.T.* case, *supra.*

The Board here found, and the Court of Appeals apparently agreed,[21] "that an understanding existed between Respondent Union and the Company that a work permit was a necessary condition of employment on the company's project." We do not know (because the Board and the lower court did not feel it necessary to find out) whether or not the Union applied this "understanding" in a discriminatory manner. We know nothing at all of the application or operation of the understanding. Does it include all employees (members as well as non-members)? Or does it just include apprentices? Was it, in effect, an agreement that only Union members would be employed? Did Union members receive preferential treatment? *We do not know.* The Board with the apparent approval of the lower court, has deliberately ignored the "true purpose" test laid down by this Court in the *Local 357, I.B.T.* case, and has reverted to a *per se* approach.

It is evident here that what we do not know is more significant than what we do know. Reinero was a member of the United Brotherhood of Carpenters and Joiners of America. He belonged to a sister local of Local 742. When he came to Decatur, Illinois, he went to the Local

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21. The Court of Appeals refers in its decision to "an understanding" but chose not to indicate of what the understanding consisted.

Union which found a job for him and issued him a work permit. He was an apprentice. Difficulties subsequently arose between Reinero and the Local Union as regards the fulfillment of his apprenticeship duties. The Local Union (rightly or wrongly—again, we do not know) refused to issue him a further work permit because of his failure to perform his duties as an apprentice. That is the full extent of the Local Union's action. The Company discharged Reinero and the Board found that an "understanding" existed that required a work permit as a condition of employment with the Company.[22]

Admittedly, if the Local Union had used the understanding to give employment preference to its members or if it used the understanding to unlawfully encourage membership in the Local Union, the Act would have been violated. *But, we do not know.* The Act defines the violation as "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organi-

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22. The only evidence adduced by the Board regarding an understanding was the following testimony of Robbins, a foreman-union member:

"Q. Did you tell him (Reinero) that if he got his work permit he could have a job?

"A. Yes.

"Q. The only reason he couldn't have his job was the failure to obtain a work permit through the local, is that correct?

"A. Well, I think that is understood.

* * *

"Q. . . . did Mr. Clark tell you you could not work the boy without a permit?

"A. Well, that is understood."

The Board elected not to pursue the subject further.

zation."[23] Without going beyond the mere existence of an "understanding" how can it be said that there was discrimination? Even beyond that, how can it be said that any presumed discrimination was "to encourage" union membership?

These, of course, are the questions this Court asked in the *Local 357, I.B.T.* case. There an understanding (memorialized in a collective bargaining agreement) existed requiring the company to hire all employees through the union. Pursuant to this understanding, an employee that was not hired through the union was, upon demand by the union, discharged. Both the Board and the Court of Appeals found a violation of the Act. This Court reversed, holding that it was not enough to show that the discharge was pursuant to an understanding or that there was a "foreseeable" encouragement of union status. Discrimination must be shown.

In the instant case, as in the case cited above, the Board stopped short. Instead of proving discrimination, it chose to rely merely upon the existence of an "understanding". And, even at that, the Board elected not to elicit the scope or operation of the understanding, but rather allowed the record to reflect merely an ill-defined, unarticulated grey area consisting of "Well, I think that is understood." In that sense, the Board here goes even beyond the position it maintained in *Local 357, I.B.T.* There, at least, the understanding was set down in writing for all to ponder. Here, on the other hand, we do not even know what the "understanding" was. It was just "understood", the witness thought. The reasons here are even more compelling for reversal than in *Local 357, I.B.T.* At least there the

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23. Section 8(a)(3), App. 4.

Board openly and by pre-announcement championed a position and overtly attempted to extend its power beyond that contemplated by Congress. Here, it has completely reverted and, under the catch-all of "substantial evidence", it attempts to bury its renewed endeavor. Certainly the Board should not be permitted to accomplish by indirection what this Court has expressly prohibited. The instant decision is in direct conflict with this Court's decision in *Local 357, I.B.T.*, 365 U.S. 667 (1961) and represents nothing more than the Board's reversion to its pre-1961 doctrine of *per se* violations.

CONCLUSION

While two issues are submitted here, each bears upon the other and both are particularly significant in the field of labor law. In the first instance, the Board deprived Petitioner of a full and fair hearing and despite given the opportunity to return the case to a Trial Examiner for the purpose of satisfying the minimal due process requirements, it chose to take the position that although an adjudicatory agency, it is not required to effectively apprise a respondent of the right to counsel. And this same presumptiveness, we submit, is seen again, when contrary to the dictates of this Court, the Board states that an "understanding", in and of itself, violates Section 8(b)(2) of the Act. This, it accomplishes by indirection under the guise of substantial evidence on the "record as a whole", but how can it be said that there is a record, even in part, when the Petitioner was deprived of the realistic right to participate in its making.

The questions presented here are of major importance to the vast majority of local unions in this county. Big-

ness, constant counsel and professional advice may be the companion of the larger local unions, but the same is not true of the prevailing situation in the country today. Unfortunately, the news reporting agencies have portrayed labor relations as existing in an arena where the participants—be they labor or management—are giants. But this type of sensationalism does not report reality, for labor unions are found in every town and hamlet and the smaller union, autonomously run by a rank and file member, still predominates. This is the type of union involved here and we submit, that above all, these unions need the protections afforded by the requirements of due process.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD M. MAMET,
Suite 1326,
327 South La Salle Street,
Chicago, Illinois 60604,
HArrison 7-7630,

Attorney for Petitioner.

Chicago, Illinois,
June 30, 1967.

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APPENDIX A

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20451

LOCAL UNION NO. 742, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition to Review and Set Aside, and on Cross-Petition for Enforcement of, an Order of the National Labor Relations Board

Decided March 16, 1967

Mr. Bernard M. Mamet, with whom *Mr. Francis X. Ward* was on the brief, for petitioner.

Mrs. Nancy M. Sherman, Attorney, National Labor Relations Board, with whom *Messrs. Arnold Ordman,* General Counsel, *Dominick L. Manoli,* Associate General Counsel, and *Marcel Mallet-Prevost,* Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent.

Before FAHY, BURGER and ROBINSON, *Circuit Judges.*

PER CURIAM: In unfair labor practice proceedings under Section 10 of the National Labor Relations Act,[1] the Trial

1. 61 Stat. 146, as amended, 29 U.S.C. § 160.

Examiner initially, and thereafter the Board, with substantial supporting evidence in the record as a whole, found that Local Union No. 742 caused an employer to refuse further employment to Robert Reinero, discharging him, in violation of Section 8(b)(1)(A) and (2) of the Act.

The essential circumstances are that Reinero was an accredited apprentice millwright. Not being a member of the Local, however, he was required to have a permit from the Local to continue the employment here involved[2] Renewal of such a permit was refused by the Local's Business Agent, thus, because of an understanding between the Local and the employer, causing his discharge. This would not have occurred as it did had Reinero been a member of or held an apprentice's permit issued by the Local. The evidence justified, as we have said, findings to the above effect, and it was within the Board's competence to conclude that in this manner the section of the Act referred to was violated by the Local. Moreover, the remedy prescribed by the Board is appropriate to the nature of the violation found.

The Local contends the Board erred in rejecting the Local's contention before the Board that it was deprived of a full and fair hearing. The contention rests upon the failure of the Trial Examiner to apprise the Business

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2. Reinero came to Local Union No. 742 in Decatur, Illinois, as a member of Local Union No. 1235, Modesto, California. The constitution of the United Brotherhood of Carpenters and Joiners of America states, "A member who desires to work in another jurisdiction and who does not wish to transfer membership, shall before going to work, secure a Working Permit in writing from the Local Union or District Council in the jurisdiction where work is secured."

Agent of the nature of the proceedings, the possible result, and the probable need for counsel.

The complaint apprised the Local of the nature of the proceedings. There is nothing whatever to indicate the Local was not aware of their nature and possible consequences, or of its right to be represented by counsel as provided in the Board's Rules and Regulations. Series 8, 29 C.F.R. § 102.38. At the opening of the hearing the Trial Examiner asked counsel and "other representatives for the parties" to state their names. For the Local, its Business Agent answered, "We have none." The Trial Examiner asked, "You have no counsel?" The Business Agent responded, "Right, we do not have counsel." Then the Trial Examiner inquired: "And you, sir, are the representative?" The Business Agent answered, "I am."

There was no denial of the right to counsel, rather a choice of the Local to be represented by its Business Agent, as was also its right. Administrative Procedure Act, § 6(a), 60 Stat. 240, 5 U.S.C. § 1005(a); Board's Rules and Regulations, Series 8, 29 C.F.R. § 102.38. Counsel for the Local cites us no civil or administrative case in support of his contention.

We think the case raises no tenable issue of due process of law.[3]

The petition of the Local is denied and the order of the Board is enforced.

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3. The Local has been represented by counsel since the Trial Examiner issued his decision.

APPENDIX B

STATUTES INVOLVED

Following are the relevant provisions of the Labor Management Relations Act, 1947; The Administrative Procedure Act; The United States Constitution; and the Federal Rules of Criminal Procedure involved herein:

Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. § 141 *et seq.*, as amended by 73 Stat. 525, 542, 545:

Section 8 (a) (3), 61 Stat. 140, 29 U.S.C. § 158 (a) (3) as amended by 73 Stat. 525, 542, 545:

8 "(a) It shall be an unfair labor practice for an employer—

"(3) by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization . . ."

Section 8 (b) (1) (A), 61 Stat. 140, 29 U.S.C. § 158 (b) (1) (A) as amended by 73 Stat. 525, 542, 545:

8 "(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1. to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title; *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;"

Section 8 (b) (2), 61 Stat. 140, 29 U. S. C. § 158 (b) (2) as amended by 73 Stat. 525, 542, 545:

8 "(b) It shall be unfair labor practice for a labor organization or its agents—

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

Section 8 (f), 61 Stat. 140, 29 U.S.C. § 158 (f) as amended by 73 Stat. 525, 542, 545:

8 "(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by an action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer,

in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to section 8 (a) (3) of this Act: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9 (c) or 9 (e).

Administrative Procedure Act; 60 Stat. 237, 5 U.S.C. § 1001 *et seq.*

Section 5 (a), 60 Stat. 240, 5 U.S.C. § 1005 (a):

"Except as otherwise provided in this chapter—

(a) Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding."

Constitution of the United States, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment

or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Federal Rules of Criminal Procedure, Rule 44:

"If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 350

LOCAL UNION NO. 742, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not yet officially reported. The Board's decision and order (J.A. 78-96)[1] are reported at 157 NLRB 451.

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[1] "J.A." refers to the Joint Appendix filed in the court of appeals. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1967 (Pet. A1, A3). On May 29, 1967, the Chief Justice extended the time for filing a petition for certiorari to and including July 14, 1967. The petition was filed on July 11, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), and of the Administrative Procedure Act, as amended (60 Stat. 237, 5 U.S.C. 1001 *et seq.*) are set forth in the Appendix to the petition, at pp. A4-A7.

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the union caused the company to discriminate against an employee, in violation of Section 8(b)(2) and (1)(A) of the National Labor Relations Act.

2. Whether, in the circumstances of this case, the union was deprived of its right to be represented by counsel at the hearing before the Board.

STATEMENT

A. The Board's Findings of Fact

In July 1964, Robert L. Reinero, a millwright apprentice and member of Carpenters' Local 1235 of

Modesto, California, arrived in Decatur, Illinois, which is within the jurisdiction of Carpenters' Local 742, petitioner herein (J.A. 79, 92; 18-19, 36). The constitution of the United Brotherhood of Carpenters, which is binding on members of all Carpenters' locals (including those employed in supervisory positions), provides (J.A. 85, n. 7; 57, 58): "A member who desires to work in another jurisdiction and who does not wish to transfer membership, shall before going to work, secure a Working Permit in writing from the Local Union or District Council in the jurisdiction where work is secured." Reinero paid John Foreman, petitioner's financial secretary and business representative, Local 742's fee for a 30-day working permit (J.A. 79, 92; 19-20, 38). Foreman first dispatched Reinero to a two-week construction job, and then to a construction job with the J. L. Simmons Company (the "Company") (J.A. 80, 92; 19-21). Company Foreman Lloyd Robbins found Reinero a "good worker" who "could do any kind of work" and did well on the job (J.A. 80; 12-13).

Business Agent Foreman had dispatched Reinero to the Company as a second-year apprentice because this was the rating marked in his dues book, which Foreman had received from Reinero's California local (J.A. 80; 20-21, 28). Reinero contended that this record was in error, and that he was entitled to the status and pay of a third-year apprentice (J.A. 80; 21, 28, 41). In an attempt to raise his classification, Reinero initiated correspondence involving both Foreman and his home local (J.A. 80; 70-77).

In early September, Foreman told Reinero to report at apprenticeship evening classes which were to be given at the union hall (J.A. 81, 92; 22). Reinero reported for the first of these, but the class was called off (J.A. 81, 92; 22). He promised his instructor that he would attend the second, but later that day received an overtime assignment from the Company which prevented his attendance (J.A. 81, 92; 12-13, 22-23). Early the following morning, he went to the union hall to explain his absence to Foreman (J.A. 81, 92; 23, 34). Upon seeing Reinero, Foreman became indignant. He accused Reinero, of "trying to get something over" on him (*ibid.*). Reinero tried to explain, but Foreman cut short the conversation. He said, "Well, you can work until your permit expires and then you are through. You won't be able to work here any more, so just get out" (J.A. 81, 93; 23).

Reinero went to the Company's job site and told Union Steward Clark and Foreman Robbins (a Brotherhood member) that Business Agent Foreman had said he would not sell Reinero a new work permit (J.A. 82, 93; 12-13, 11, 7). Both Clark and Robbins, in the presence of each other, told Reinero that he would not be able to work without a work permit (J.A. 92, 82; 24). Robbins urged Reinero to try again after Foreman had "cooled off" (J.A. 24, 11). After Reinero left, Clark and Robbins discussed the matter. At the Board hearing Robbins testified, respecting their conversation, that "we know" that the Company could not work Reinero without a work

permit, and that, although Clark said "very little" about Reinero specifically, "these things don't have to be said in words, they are understood more or less * * * we as union people know these things" (J.A. 94, 11).[2] Robbins also testified that, as an active union member, he did his "best" to abide by all provisions of the constitution and rules of the United Brotherhood of Carpenters, including the requirements that foremen comply therewith and that carpenters working outside their home local's jurisdiction obtain work permits (J.A. 85, n. 6; 8, 57, 58). He added that it was "up to the steward to see that that is enforced. The steward clears the man. * * * The man will ask the steward and show that he is cleared, and when he is cleared, then he goes to work" (J.A. 9-10).

After the October 1 conversation with Clark and Robbins about his work permit, Reinero consulted Raymond Davis, an official of the Bureau of Apprenticeship and Training, U.S. Department of Labor (J.A. 82; 10, 24, 25). While Reinero was in his office, Davis telephoned Business Agent Foreman to ask him about the problem which Reinero had raised regarding his apprenticeship status (J.A. 82; 10, 25-26).

On October 8 Reinero's work permit expired (J.A. 82, 93; 24). The next morning, while he stood in line

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[2] Robbins added that Reinero had to have "a permit to work in this area" because he came from "a different local" (J.A. 9).

at the union hall with his renewal permit fee in hand, Foreman called out, "Put your money away. It is no good here any more" (J.A. 82; 25). He also rebuked Reinero for "monkeying around with the Federal Government," adding, "The problem you had was between you and I. What did you go to see Davis for?" (J.A. 82; 25, 28-29). Foreman told Reinero that he should work out his problems in the local union and "not run to the Federal Agency to straighten out your problems." He added, "You have now got * * * yourself in a position where you are not only trying to dictate or operate the apprenticeship program, you are now getting in the position to dictate the policy for the local union. * * * You have violated every rule in the Brotherhood * * *" (J.A. 34), and further stated, "[Y]ou are through in my jurisdiction over here. Just go out to the job, get your tools and get out" (J.A. 83, 93; 25).[3]

Reinero went to the job site and found Company Foreman Robbins and Union Steward Clark. He informed them that Business Agent Foreman had refused to sell him the new work permit and had told him he could not work any more. Clark said, "Junior, I don't have anything against you but you know I can't let you work, don't you?" Robbins commented, "That's right, you need a work permit" (J.A. 83,

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[3] Foreman explained at the Board hearing that, by seeking redress outside the Brotherhood, Reinero had breached a "manly principle in violation of our Brotherhood. * * * I say he is a renegade now and I do mean he is a renegade * * *" (J.A. 83-84; 34-35).

93, 94, n. 3; 25, 12).[4] Robbins then took Reinero to Superintendent Mowers, who, like Robbins, was an active member of the Brotherhood (J.A. 84; 37). Robbins explained that Reinero had been unable to get a new work permit (J.A. 83, 93; 26). Mowers wrote out and handed Reinero a check for the wages due him (*ibid.*) Robbins "encouraged" Reinero to "keep trying," to "try to get this work permit so [he] could come back to work" (J.A. 26).

B. The Board's Conclusions and Order

The Board found there was an understanding between petitioner and the Company whereby non-members of petitioner could be employed only if they obtained a work permit from petitioner; and that, pursuant to this understanding, petitioner, through its agents, caused the Company to terminate Reinero's employment solely because he no longer had such a permit. The Board concluded that petitioner thereby discriminated against Reinero, in violation of Section 8(b)(2) and (1)(A) of the Act (J.A. 93-94, 85-86).[5] Finding that petitioner had elected to

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[4] At the Board hearing Robbins testified as follows (J.A. 83, n. 3, 94, n. 3; 12):

> Q. Did you tell him [Reinero] that if he got his work permit he could have a job?
> A. Yes.
> Q. The only reason he couldn't have his job was the failure to obtain a work permit through the Local, is that correct?
> A. Well, I think that is understood, yes.

[5] The Board further held that, independently of any such understanding, petitioner had unlawfully caused Reinero to be

be represented at the hearing by Business Agent Foreman rather than by an attorney, the Board rejected petitioner's contention that the absence of counsel deprived it of a fair hearing (J.A. 91, n. 2).

The Board ordered petitioner to cease and desist from the unfair labor practices found, to make Reinero whole for any loss of earnings, to notify the Company and Reinero that it has no objection to his employment, and to post appropriate notices (J.A. 87-91, 96).

C. The Decision of the Court of Appeals

In a *per curiam* opinion, the court of appeals concluded that the evidence justified the Board's findings that Reinero was required by an understanding between petitioner and the Company to have a work permit to keep his job; that petitioner's refusal to renew his permit caused his discharge; and that this would not have occurred had Reinero been a member of, or held a permit issued by, petitioner (Pet. App. A2). The court below further found that petitioner was not denied counsel, but had chosen to be represented by its business agent. Accordingly, the court of appeals enforced the Board's order (Pet. App. A3).

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discharged, for, when Union Steward Clark told Reinero in the presence of Company Foreman Robbins that Clark could not let Reinero work without a permit, this was tantamount to a direction to the Company to discharge Reinero because he no longer had a permit (J.A. 94-95).

ARGUMENT

1. There is no substance to petitioner's contention (Pet. 15-19) that the Board's unfair labor practice finding rests on the premise that a union-employer agreement which conditions employment on the acquisition of a work permit is *per se* illegal under the Act. The Board found, and the court of appeals concluded that the record supported its finding, that the hiring arrangement between petitioner and the Company discriminated against non-members of petitioner, *i.e.*, non-members had to obtain a work permit as a condition of obtaining employment, but members could obtain jobs without such a permit. Moreover, the record shows (*supra*, pp. 4-8) that Reinero, who was an accredited apprentice millwright, had his employment with the Company terminated solely because petitioner's business agent had failed to renew his permit.[6] In these circumstances, the Board was warranted in concluding that Reinero was treated differently in respect to employment than he would have been had he been a member of petitioner, in violation of Section 8(b)(2) and (1)(A) of the Act.[7]

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[6] Although petitioner suggests that Reinero was denied a permit because he had not performed his duties as an apprentice (Pet. 17), the Board found that the Company was merely informed that he could not be retained because he lacked a work permit (J.A. 94-95).

[7] Section 8(b)(2) makes it unlawful for a union to cause "an employer to discriminate against an employee in violation of [Section 8(a)(3)]." Section 8(a)(3), in turn, makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment * * * to encourage or discourage

Nor does the decision of the court below conflict with *Local 357, Teamsters* v. *National Labor Relations Board*, 365 U.S. 667, as contended by petitioner (Pet. 15). *Local 357* merely holds that a hiring-hall arrangement, under which the employer has delegated to the union exclusive control over referrals for employment, is not *per se* violative of the Act. In so holding, this Court specifically recognized that such an arrangement would be unlawful where the union had exercised its referral power in a discriminatory manner (365 U.S. at 676-677).[8] Here, as shown, the Union acted discriminatorily in refusing to renew Reinero's work permit.

2. There is likewise no substance to petitioner's contention (Pet. 8-15) that it was denied the right to be represented by counsel at the hearing before the trial examiner. Although petitioner was represented by its business agent, John Foreman, the court below noted (Pet. App. A3) that the "complaint apprised the Local of the nature of the proceedings," and that

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membership in any labor organization." Section 8(b)(1)(A) makes it unlawful for a union "to restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7," which includes the right "to form, join, or assist labor organizations" and the right "to refrain from any or all of such activities."

[8] There was concededly no proof of actual discrimination in *Local 357*. As the Court noted (365 U.S. at 675): "The only complaint in the case was by Slater, a union member, who sought to circumvent the hiring-hall agreement. When an employer and the union enforce the agreement against union members, we cannot say without more that either indulges in the kind of discrimination to which the Act is addressed."

there is "nothing whatever to indicate the Local was not aware of their nature and possible consequences,[9] or of its right to be represented by counsel as provided in the Board's Rules and Regulations." [10] Moreover, as the court further noted (*ibid.*):

> At the opening of the hearing the Trial Examiner asked counsel and "other representatives for the parties" to state their names. For the Local, its Business Agent answered, "We have none." The Trial Examiner asked, "You have no counsel?" The Business Agent responded, "Right, we do not have counsel." Then the Trial Examiner inquired: "And you, sir, are the representative?" The Business Agent answered, "I am." [J.A. 3-4.]

In these circumstances, as the court below correctly found (*ibid.*), "[t]here was no denial of the right to counsel, rather a choice of the Local to be represented by its Business Agent, as was also its right." [11]

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[9] Foreman had at least 15 years' experience on petitioner's bargaining committee and was well aware that the Brotherhood's work permit requirements had previously exposed it to legal difficulties (J.A. 36, 40).

[10] Section 102.38 of those rules and regulations (29 C.F.R. 102.88) provides: "Any party shall have the right to appear at such hearing in person, by counsel, or by other representative * * *." The complaint also specifically stated that petitioner had "the right to appear in person, or otherwise, and give testimony" (J.A. 53).

[11] Petitioner has been represented by counsel since the trial examiner issued his decision, even at the stage when exceptions were filed to that decision with the Board.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

NANCY M. SHERMAN,
Attorney,

National Labor Relations Board.

AUGUST 1967.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 271392 87